

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

AMY ROTH, SHANA EKIN, as  
individuals and on behalf of themselves  
and all others similarly situated,

Plaintiffs,

v.

CHA HOLLYWOOD MEDICAL  
CENTER, L.P., d/b/a CHA Hollywood  
Presbyterian Medical Center and  
Hollywood Presbyterian Medical Center;  
CHS HEALTHCARE MANAGEMENT,  
L.L.C.,

Defendants.

Case No. 2:12-cv-07559-ODW(SHx)

**ORDER DENYING PLAINTIFF'S  
MOTION FOR CLASS  
CERTIFICATION [55]**

**I. INTRODUCTION**

On May 24, 2012, Amy Roth<sup>1</sup> and Shana Ekin filed a First Amended Complaint in Los Angeles County Superior Court against Defendants CHA Hollywood Medical Center and CHS Healthcare Management, LLC (collectively “HPMC”), alleging claims for failure to provide mandated meal and rest breaks, failure to pay wages when due, failure to provide accurate wage statements, and violation of California’s Unfair Competition Law. After removal to this Court, Ekin moved to certify a class of nonexempt registered nurses (“RN”) and licensed vocational nurses (“LVN”) who worked 12-hour shifts at HPMC and did not receive two meal breaks and three rest

---

<sup>1</sup> Amy Roth was dismissed from this case while the action was pending in Los Angeles County Superior Court.

breaks as required by California labor law. Though Ekin contends that HPMC has uniform policies and practices that apply to all putative class members, the Court finds that the class is not presently ascertainable, there is no common issue that would resolve all class members' claims in one stroke, and individual issues would predominate over classwide determinations. The Court therefore **DENIES** Ekin's Motion for Class Certification.<sup>2</sup>

## II. FACTUAL BACKGROUND<sup>3</sup>

HPMC includes 22 departments that employ nurses. (Aug. 24 2012 Braun Dep. 64:15–25.) All RNs except for the nursing directors and director of nursing operations are nonexempt employees. (*Id.* 87:1–3.) All LVNs are also nonexempt. (*Id.* 87:9–11.)

HR Policy 504 sets forth HPMC's policy regarding rest and meal breaks and is included in its human-resources manual. (*Id.* 152:20–23; 154:10–25.) The policy provides that employees "who work shifts equal to or in excess of ten (10) hours are entitled to two (2) half (1/2) hour unpaid meal periods, unless they have signed an appropriate meal waiver form for one of the two breaks." (Braun Dep. Ex. 4.) If an employee works during a meal period, "an employee will be paid for this time as 'time worked' and may be entitled to additional amounts under applicable California wage and hour law." (*Id.*) The policy also states that employees are entitled to "one (1) ten (10) minute break every four (4) hours worked." (*Id.*) Further, employees "are entitled to three (3) rest breaks when working twelve-hour shifts." (*Id.*)

///

///

---

<sup>2</sup> After carefully considering the papers filed with respect to this Motion, the Court deems the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; L.R. 7-15.

<sup>3</sup> The Court has reviewed each party's evidentiary objections and responses. To the extent that the Court relies upon evidence to which one or both parties have objected, the Court overrules those objections. The Court finds that the evidence upon which the Court relies is either within the declarants' personal knowledge or based on nonhearsay under the Federal Rules of Evidence.

1           1.     *Meal breaks*

2           Roth, a former charge nurse, testified that she heard through word of mouth that  
3 she was to take only one meal break. (Roth Dep. 70:23–71:1.) She also discerned  
4 that HPMC’s policy was to take only two rest breaks based on observing other charge  
5 nurses. (*Id.* 76:5–14.)

6           HPMC’s charge nurses schedule the nurses’ meal breaks in some departments.  
7 (Back Decl. ¶ 5; Gianan Decl. ¶ 6; Hamzie Decl. ¶ 6; Quilnet Decl. ¶ 7.) Other  
8 employees indicated that the meal breaks are not scheduled. (Cruz Decl. ¶ 5; Liu  
9 Decl. ¶ 6; Mencias Decl. ¶ 6; Moore Decl. ¶ 6; Nam Decl. ¶ 6.) Ekin adduced staff-  
10 assignment sheets that do not appear to have scheduling slots for all mandated breaks.  
11 (Whitlock Decl. Ex. 5.) But these sheets are only guidance, and nurses do not always  
12 consult them to determine when to take their breaks. (Mar. 5, 2013 Braun Dep.  
13 48:18–25; Barkley Decl. ¶ 17; Cortez Dep. 74:13–19.)

14           California law mandates certain nurse-to-patient ratios, which depend upon  
15 patients’ acuity. (Doyle Dep. 57:4–8.) Acuity is not a static function but rather can  
16 change from hour to hour with each patient. (*Id.* 56:8–18; *see also* Cruz Decl. ¶ 5;  
17 Dilay Decl. ¶ 5; Gianan Decl. ¶ 5; Hamzie Decl. ¶ 5; Kim Decl. ¶ 6.) Ekin submitted  
18 a declaration from Constance Doyle, Ekin’s designated nursing expert, who concluded  
19 that “even without the detailed census data and the actual assignment sheets for each  
20 department, . . . the policy and practice of the Hospital is, and has been to staff nurses  
21 at the minimum needed to meet the statutory nurse to patient requirements.” (Doyle  
22 Decl. ¶ 16; *see also* Barkley Decl. ¶ 10.) She also opined that “there were no relief  
23 nurses assigned” to cover breaks despite the industry standard. (*Id.* ¶¶ 17, 20.) But  
24 Doyle did notice that there was a float nurse, though she could not discern where the  
25 nurse was assigned. (Doyle Dep. 169:17–20.)

26           Some employees testified that they were always able to take their meal breaks.  
27 (Williams Dep. 51:13–15; Dilay Decl. ¶ 7; Gianan Decl. ¶ 8; Ijares Decl. ¶ 8; Lee  
28 Decl. ¶ 7; Leyna Decl. ¶ 8; Matz Decl. ¶ 5; Naval Decl. ¶ 7; Oro Decl. ¶ 8; Singh

1 Decl. ¶ 7.) Others stated that they never received a second meal break. (Akopian  
2 Decl. ¶ 5; Cortez Decl. ¶ 10; De los Santos Decl. ¶ 6; Del Rosario Decl. ¶ 9.) Some  
3 employees indicated that there was sometimes no one available to relieve them for a  
4 break. (Akopian Decl. ¶ 13; Baladad Decl. ¶ 6; Barkley Decl. ¶ 11; Cortez Decl. ¶ 5;  
5 Cuarto Decl. ¶ 9; De los Santos Decl. ¶ 9; Del Rosario Decl. ¶ 6.) Other employees  
6 used or were told to use the buddy system, meaning that one nurse would cover the  
7 other's break. (Barkley Decl. ¶ 15.)

8 Each department's charge nurses are usually the ones designated to cover  
9 nurses' breaks. (Mar. 5, 2013 Braun Dep. 85:8–15.) There was sometimes a recourse  
10 nurse to cover nurses' breaks as well. (Cortez Dep. 23:20–23; Villanueva Decl. ¶ 7;  
11 Mar. 5, 2013 Braun Dep. 51:16–17.) But the hospital does not specifically designate  
12 anyone as a relief nurse. (Mar. 5, 2013 Braun Dep. 86:11–12.) HPMC also does not  
13 prohibit charge nurses from having their own patient assignments. (Mar. 5, 2013  
14 Braun Dep. 92:1–5.)

15 Sagra Norma Braun, HPMC's Vice President of Human Resources, admitted  
16 that there are days when nurses are not going to get proper breaks, because there are  
17 "so many patients in there that they can't take a break." (*Id.* 59:13–15.) Since the  
18 middle of 2011, the time clocks have displayed an electronic attestation stating that  
19 the employee agrees with her hours and for the day and that she has received her meal  
20 and rest breaks. (Aug. 24 2012 Braun Dep. 187:20–188:17; Mar. 5, 2013 Braun Dep.  
21 71:23–72:3.) Before that time, employees could indicate incorrect hours, such as  
22 missed breaks, via an "E-time correction form." (Mar. 5, 2013 Braun Dep. 72:4–13.)

23 New employees receive a packet of forms, which includes a meal waiver. The  
24 employee may waive a second meal break if she chooses. (Aug. 24 2012 Braun  
25 Dep. 162:13–20; Braun Decl. ¶ 15.) Not all employees waive their second meal  
26 break. (*See id.* Ex. G.) Of the 17 putative class members who submitted a declaration  
27 in support of Ekin's Motion, 12 signed a meal waiver. (*Id.* ¶ 15.)

28 ///

1           2.     *Rest breaks*

2           Several putative class members testified that they were sometimes unable to  
3 take rest breaks because the hospital was too busy or there was no relief nurse. (Roth  
4 Dep. 81:23–25; Akopian Decl. ¶ 6.) Some employees voluntarily choose not to take  
5 all of their rest breaks. (*See, e.g.*, Aranas Decl. ¶ 10; Back Decl. ¶ 10; Cruz Decl.  
6 ¶ 11; Dilay Decl. ¶ 11; Ijares Decl. ¶ 11; Lee Decl. ¶ 11.) Others always take their  
7 rest breaks. (*See, e.g.*, Kong Decl. ¶ 12.) Some nurses stated that they were  
8 frequently interrupted while taking their meal and rest breaks. (Cortez Decl. ¶ 8;  
9 Cuarto Decl. ¶ 7; De los Santos Decl. ¶ 5; Del Rosario Decl. ¶ 8; Gabriel Decl. ¶ 12.)

10          3.     *Shana Ekin*

11          Ekin testified that she was free to use her discretion to take a break when she  
12 felt it was appropriate. (Ekin Dep. 117:19–22.) Ekin testified that about 50 percent of  
13 the time there was a midshift nurse scheduled to cover breaks. (*Id.* 52:4–19.) For  
14 most days, the hospital was fully staffed, which allowed the nurses to maintain the  
15 proper nurse-to-patient ratio. (*Id.* 112:4–16.)

16          Ekin signed a waiver of her second meal break and understood that she could  
17 revoke it at any time. (*Id.* at 83:2–11; Kemple Decl. Ex. 16.) In the eight years that  
18 Ekin worked at HPMC, she only missed her meal break twice. (Ekin Dep. 68:24–  
19 69:2.) While Ekin documented her missed breaks, she does not recall whether the  
20 hospital paid her for those breaks. (*Id.* 69:3–11.)

21          4.     *Class-certification motion*

22          On September 4, 2013, Defendants removed the case to this Court. (ECF  
23 No. 1.) The Court initially remanded the case, but the Ninth Circuit Court of Appeals  
24 reversed that decision. (ECF Nos. 21, 30.) This Court subsequently denied a second  
25 remand motion. (ECF No. 48.) On September 25, 2013, Ekin moved for class  
26 certification. (ECF No. 55.) HPMC timely opposed. That Motion is now before the  
27 Court for decision.

28       ///

### III. LEGAL STANDARD

Under Federal Rule of Civil Procedure 23(a), a party seeking class certification must initially meet four requirements:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

The proposed class must also satisfy at least one of the three requirements listed in Rule 23(b). *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548 (2011). Here, Ekin relies solely on Rule 23(b)(3), which states that a class may be maintained where “questions of law or fact common to class members predominate over any questions affecting only individual members,” and a class action would be “superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).

The plaintiff bears the burden of demonstrating that the putative class satisfies each of Rule 23(a)’s elements along with one component of Rule 23(b). *Conn. Ret. Plans & Trust Funds v. Amgen Inc.*, 660 F.3d 1170, 1175 (9th Cir. 2011). In that regard, “Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc.” *Dukes*, 131 S. Ct. at 2551.

A district court must perform a “rigorous analysis” to ensure that the plaintiff has satisfied each of Rule 23(a)’s prerequisites. *Dukes*, 131 S. Ct. at 2551; *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 980 (9th Cir. 2011). In many cases, “that ‘rigorous analysis’ will entail some overlap with the merits of the plaintiff’s underlying claim. That cannot be helped.” *Dukes*, 131 S. Ct. at 2551. When

1 resolving such factual disputes in the context of a motion for class certification,  
 2 district courts must consider “the persuasiveness of the evidence presented.” *Ellis*,  
 3 657 F.3d at 982 (holding that a district court must judge the persuasiveness and not  
 4 merely the admissibility of evidence bearing on class certification). Ultimately the  
 5 decision to certify a class reposes within the district court’s discretion. *Zinser v.*  
 6 *Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001).

#### 7 **IV. DISCUSSION**

8 Ekin moves to certify one class and three subclasses. She defines her general  
 9 class as all “non-exempt employees who were or are employed by Defendants during  
 10 any part of the proposed class period in California, and holding the title of nurse,  
 11 LVN, or RN, and who, at any time during the proposed class period, worked a 12-  
 12 hour shift, but excluding Clinical Supervisors and Directors.” (Mot. 9.) She defines  
 13 her Rest Break Subclass as all “class members who did not receive at least three duty-  
 14 free ten minute rest breaks during the course of a 12-hour shift.” (*Id.*) In the Meal  
 15 Period Subclass, Ekin includes all “class members who did not receive mandated meal  
 16 periods, because they were either late, or not provided at all, or were not duty-free for  
 17 at least 30 minutes, or because no second meal period was provided.” (*Id.*) Finally,  
 18 the Terminated Employee Sub-Class includes all “Class Members whose employment  
 19 with Defendants terminated during the Class Period.” (*Id.* at 10.)

##### 20 **A. Ascertainability**

21 A class definition should be “precise, objective, and presently ascertainable,”  
 22 that is, the class must be “definite enough so that it is administratively feasible for the  
 23 court to ascertain whether an individual is a member.” *O’Connor v. Boeing N. Am.,*  
 24 *Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998) (internal quotation marks omitted). But  
 25 class treatment is not appropriate if “the court must determine the merits of an  
 26 individual claim to determine who is a member of the class.” *Johns v. Bayer Corp.*,  
 27 280 F.R.D. 551, 555 (S.D. Cal. 2012).

28 ///



1 Ekin argues that one can determine who is a class member by evaluating  
2 HPMC's payroll records. She also contends that the number of missed breaks could  
3 be determined by reviewing the nurse assignment sheets and patient logs from each  
4 department. But HPMC asserts that Ekin's class definition impermissibly requires a  
5 liability determination of whether HPMC provided someone with a meal or rest break.  
6 HPMC further argues that one cannot ascertain the class from payroll records, because  
7 employees do not clock out for rest breaks, and a meal break may be provided by  
8 HPMC but not taken at the employee's election.

9 Defining the class in part based on whether a break "was provided" necessarily  
10 entails a legal inquiry. As the California Supreme Court held in *Brinker Restaurant*  
11 *Corp. v. Superior Court*, an employer "provides" a meal break when "it relieves its  
12 employees of all duty, relinquishes control over their activities and permits them a  
13 reasonable opportunity to take an uninterrupted 30-minute break, and does not impede  
14 or discourage them from doing so." 53 Cal. 4th 1004, 1040 (2012). Whether HPMC  
15 "provided" meal breaks, that is, relieved each putative class member of all duties  
16 during those breaks, depends upon a legal determination under *Brinker*. The necessity  
17 for that individual inquiry belies class ascertainability.

18 In her reply, Ekin argues that even if the Court determines that she defined a  
19 "failsafe class," the Court should rewrite the class definition to avoid this result. A  
20 failsafe class is one in which the class members "either win or are not in the class." *In*  
21 *re AutoZone, Inc., Wage & Hour Emp't Practices Litig.*, 289 F.R.D. 526, 546 (N.D.  
22 Cal. 2012) (internal quotation marks omitted). The Ninth Circuit appears hostile to  
23 these failsafe classes, though it has not yet held in a published opinion that they are  
24 impermissible. *Id.*; *Kamar v. RadioShack Corp.*, 375 F. App'x 734, 736 (9th Cir.  
25 2010).

26 Even if the Court were to permit Ekin's failsafe class definitions  
27 notwithstanding the Ninth Circuit's enmity, her Rest Break Subclass and Meal Period  
28 Subclass definitions would create an unworkable, cart-before-the-horse problem.



1 There would be no way to send out individual notices without first making a legal  
 2 determination of whether HPMC “provided” each putative class member with proper  
 3 meal breaks under the *Brinker* formulation. The same problem holds true with  
 4 whether a putative class member “received” at least three rest breaks. These  
 5 definitional difficulties foreclose any determination that Ekin’s class is  
 6 “administratively feasible.” *O’Connor*, 184 F.R.D. at 319.

### 7 **B. Commonality**

8 Like in *Dukes*, the “crux of this case is commonality.” *Dukes*, 131 S. Ct. at  
 9 2250. The Supreme Court held that Rule 23(a)’s commonality element requires a  
 10 common contention that is “of such a nature that it is capable of classwide  
 11 resolution—which means that determination of its truth or falsity will resolve an issue  
 12 that is central to the validity of each one of the claims in one stroke.” *Id.* at 2551. The  
 13 focus is not just on raising common questions, “even in droves—but, rather the  
 14 capacity of a classwide proceeding to generate common *answers* apt to drive the  
 15 resolution of the litigation.” *Id.* (internal quotation marks omitted).

16 Ekin argues that HPMC has several policies and practices that uniformly impact  
 17 her putative class. First, she contends that HR Policy 504 does not comport with  
 18 Wage Order No. 5,<sup>4</sup> because it fails to acknowledge an employee’s entitlement to a  
 19 rest break for every four hours worked, “or major fraction thereof.” Second, she  
 20 asserts that HPMC’s actual policy is to permit only two rest breaks during a 12-hour  
 21 shift despite nurses being entitled to three rest breaks for 12 hours worked. Ekin  
 22 further argues that HPMC uniformly permits employees to be interrupted during their  
 23 meal and rest breaks, thereby preventing the breaks from being duty-free. Doyle,  
 24 Ekin’s expert, opined that HPMC also has a standard policy of only staffing the  
 25 minimum number of nurses necessary to meet each department’s statutory nurse-to  
 26

---

27 <sup>4</sup> Wage Order No. 5 provides in relevant part that the “authorized rest period time shall be based on  
 28 the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours *or major fraction thereof*.” Cal. Code Regs. tit. 8, § 11050(12)(A) (emphasis added).

1 patient ratios, which Ekin contends precludes nurses from taking breaks. Lastly, Ekin  
2 asserts that HPMC has a companywide policy of requiring all nurses to sign a waiver  
3 of their second meal break upon being hired.

4 HPMC ardently disputes Ekin's alleged common questions. HPMC points out  
5 that while HR Policy 504 may omit the "or major fraction thereof" language, the  
6 policy specifically states that employees "are entitled to three (3) rest breaks when  
7 working twelve-hour shifts." HPMC also argues that declarations from putative class  
8 members show nurses taking anywhere from no rest breaks to as many as they  
9 wanted. The declarations also run the gamut on meal breaks, with nurses differing on  
10 whether they took two meal breaks. For those putative class members who appear on  
11 payroll records to have missed a break, HPMC contends that Ekin has not offered a  
12 common method of determining whether HPMC timely provided a break to a nurse  
13 who then voluntarily did not take the break until later. Likewise, HPMC argues that  
14 there is no way to assess if and why any putative class member worked through a  
15 break. Defendants also submitted evidence of several nurses who refused to sign the  
16 meal-break waiver and others who voluntarily signed it—including Ekin herself.

17 Ekin has not demonstrated a common factual thread that ties together all  
18 putative class members' claims. First, HR Policy 504's validity does not constitute a  
19 common question for the putative class with respect to rest breaks. While Ekin makes  
20 much of the fact that the policy omits the "or major fraction thereof" language  
21 contained in Wage Order No. 5, whether that omission renders the policy facially  
22 invalid under the California Labor Code is not an issue in this case. Ekin limits her  
23 class definition to only nonexempt nurses who "worked a 12-hour shift." (Mot. 9.)  
24 With nurses working 12 hours, there is no issue of the nurses potentially not having  
25 received a break at a fraction of four hours, as 12 hours evenly divides into three, four-  
26 hour periods—and thus three mandated rest breaks. HR Policy 504 specifically states,  
27 "Employees are entitled to three (3) rest breaks when working twelve-hour shifts."

28 ///

1 There is simply no “fraction thereof” issue—and thus no commonality stemming from  
2 HR Policy 504. *See Brinker*, 53 Cal. 4th at 1029.

3 Neither has Ekin established any uniform policy or practice that rendered each  
4 putative class member too busy or unable to take statutorily mandated rest or meal  
5 breaks. Many declarants testified that they frequently did not have adequate coverage  
6 to take proper breaks. But many others nurses asserted that they were able to take  
7 their breaks by using the buddy system or being relieved by a charge or recourse  
8 nurse. The fact that some putative class members had no issue taking proper breaks  
9 demonstrates that there will be no way to determine that HPMC has a uniform,  
10 classwide policy of rendering employees unable to take rest and meal periods in each  
11 instance. *See Gonzalez v. Millard Mall Servs., Inc.*, 281 F.R.D. 455, 463-64 (S.D.  
12 Cal. 2012) (“Because of the varying declarations and conflicting facts of the putative  
13 class members, Plaintiffs have failed to show that Defendants had a common policy  
14 that ‘prevented’ employees from taking meal breaks and/or failed to ‘permit and  
15 authorize’ employees to take rest breaks under Rule 23(a)(2).”).

16 Rather, adjudication of these claims would require an individual determination  
17 of whether a particular nurse was too busy, had no coverage, or both for each rest and  
18 meal break to which she was entitled. When the impact of an employer’s policies  
19 depends on each individual employee’s circumstances, class certification is not  
20 appropriate. *Brown v. Fed. Express Corp.*, 249 F.R.D. 580, 586 (C.D. Cal. 2008).

21 Doyle testified that “it appears the policy and practice of the Hospital is, and  
22 has been to staff nurses at the minimum needed to meet the statutory nurse to patient  
23 requirements.” But the Court is not persuaded that Ekin has demonstrated that  
24 Doyle’s opinion qualifies for admission under Federal Rule of Evidence 702.  
25 Admissibility of expert testimony “entails a preliminary assessment of whether the  
26 reasoning or methodology underlying the testimony is scientifically valid and of  
27 whether that reasoning or methodology properly can be applied to the facts in issue.”  
28 *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592–93 (1993). The testimony

1 must, among other things, be based on sufficient facts or data and be the product of  
2 reliable principles and methods. Fed. R. Evid. 702(b), (c).

3 Before giving her opinion, Doyle reviewed 11 declarations and about 42,000  
4 staffing and assignment documents. (Doyle Dep. Errata Sheet; 66:17–23.) But Doyle  
5 did not review the acuity of any HPMC patients in coming to her opinion. (*Id.* 74:5–  
6 8.) Neither did she conduct any independent investigation. (*Id.* 82:11–25.) She  
7 further admits that Ekin did not provide Doyle with patient-census information, and if  
8 Doyle had received this information, she could have “come to very definitive  
9 conclusions as to the compliance by the Hospital with the required nurse to patient  
10 ratios.” (Doyle Decl. ¶¶ 14–15.)

11 Without having this patient information, it is difficult to understand how Doyle  
12 could come to any reliable inference about whether HPMC only staffed the minimum  
13 number of nurses to meet the statutory ratios. One cannot determine a nurse-to-patient  
14 ratio without having the patient side of the calculation. And without determining this  
15 alleged bare-staffing practice, there is no way to tell on a classwide basis whether  
16 HPMC invariably prevented all putative class members from taking rest and meal  
17 breaks. Indeed, several putative class members indicated that they were able to take  
18 proper breaks—a factor counseling against a commonality determination.

19 Even if there were some theoretical way to determine the nurse-to-patient ratio  
20 for each of HPMC’s 22 departments that employ nurses, those calculations would  
21 vary depending on the time each nurse took her breaks. One would also have to  
22 determine on an individual basis whether the particular department was at that discrete  
23 point in time minimally staffed to meet the ever-shifting ratio. There is nothing  
24 “common” about that individualized inquiry.

25 Ekin’s assertion that nurses were frequently interrupted during their breaks also  
26 does not satisfy the commonality requirement. There is no way to determine “in one  
27 stroke” whether a particular break for a particular putative class member was  
28 interrupted and to what degree. The nurses themselves differ on whether these

1 interruptions prevented them from taking duty-free breaks. Ekin did not, for example,  
 2 show that a putative class member would invariably face a particular type of  
 3 interruption during each break.

4 Further, Ekin alleges that HPMC has a common policy of requiring all  
 5 employees to sign a meal waiver as a condition of employment. An employer's  
 6 blanket requirement that all employees sign a waiver of a second meal break may  
 7 satisfy the commonality requirement. *See Faulkinbury v. Boyd & Assocs., Inc.*, 216  
 8 Cal. App. 4th 220, 234 (Ct. App. 2013). But HPMC submitted evidence that at least  
 9 28 employees refused to sign the waiver. (Braun Decl. Ex. G.) That substantial  
 10 number squarely contradicts Ekin's condition-of-employment assertion.

11 The Court therefore finds that Ekin has not established any common contention  
 12 the determination of which "will resolve an issue that is central to the validity of each  
 13 one of the claims in one stroke." *Dukes*, 131 S. Ct. at 2551.

14 Ekin's other causes of action suffer a similar definitional fate. She admits in  
 15 her Motion that her failure-to-pay-wages-when-due, failure-to-provide-accurate-wage-  
 16 statements, and Unfair Competition Law claims all derive from HPMC's alleged  
 17 failure to provide proper rest and meal breaks. Since the Court finds that Ekin has not  
 18 demonstrated the requisite commonality for her break claims, the same finding holds  
 19 true for Ekin's remaining claims.

#### 20 **C. 23(b)(3) requirements**

21 The Supreme Court has held that Rule 23(b)(3)'s predominance inquiry  
 22 assesses "whether the proposed classes are sufficiently cohesive to warrant  
 23 adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623  
 24 (1997). The predominance element is "far more demanding" than Rule 23(a)'s  
 25 commonality requirement. *Id.* at 624. Under the Supreme Court's recent decision in  
 26 *Comcast Corp. v. Behrend*, damages must be "capable of measurement on a classwide  
 27 basis" to establish predominance. 133 S. Ct. 1426, 1433 (2013). Otherwise, questions  
 28 of "individual damages calculations will inevitably overwhelm questions common to

1 the class.” *Id.* Rule 23(b)(3) also requires that class-action treatment be the superior  
2 method of adjudicating the dispute.

3 Ekin asserts that because all of the putative class members’ claims result from  
4 HPMC’s same employment practices, common liability issues predominate. She also  
5 cites to the dissent in *Comcast* and argues that the Supreme Court’s decision should  
6 not be read to impose a requirement that damages be measurable on a classwide basis.

7 HPMC contends that one cannot use the nurse-to-patient ratio to determine  
8 whether the putative class members were too busy to take breaks, because one cannot  
9 know what the ratio was at any given time. HPMC also argues that even if Ekin could  
10 establish a common policy of not providing proper rest and meal breaks, she has not  
11 identified a common method of proof to determine who took breaks, when, and why.

12 As the Court already determined, HR Policy 504 does not provide the requisite  
13 common question sufficient for class certification. And without that common thread,  
14 one must engage in individual inquiries regarding each putative class member to  
15 determine if, when, and why a nurse did or did not take all mandated breaks. As one  
16 district court aptly noted, “a plaintiff must do more than show that a meal break was  
17 not taken to establish a violation. Instead, he must show that the employer impeded,  
18 discouraged, or prohibited him from taking a proper break.” *Washington v. Joe’s*  
19 *Crab Shack*, 271 F.R.D. 629, 641 (N.D. Cal. 2010). The crucial inquiry therefore “is  
20 the reason that a particular employee may have failed to take a meal break.” *Id.*  
21 (finding for this reason that common issues did not predominate).

22 Neither does Ekin’s argument that one could look to HPMC’s payroll records to  
23 determine which putative class members were not provided with required rest and  
24 meal breaks help the predominance inquiry. Even assuming that the records are  
25 accurate, “the resources that would be expended on determining the reason for missed  
26 breaks would exceed those saved by classwide determination of the number of breaks  
27 missed. Assuming that the timesheets are accurate, it would take little time for the

28 ///

1 number of missed breaks to be established in separate actions.” *Brown*, 249 F.R.D. at  
2 587 (denying class certification).

3 The same holds true for each department’s assignment sheets. The assignment  
4 sheets do not reflect why nurses missed breaks, how late the breaks were provided,  
5 whether a break was interrupted, or whether an employee waived a break. Several  
6 putative class members testified that they did not even consult the assignment sheets  
7 in determining when to take their rest and meal breaks. Without any documentary  
8 evidence to review, one would have to interview each class member to determine  
9 whether she missed breaks and the circumstances surrounding each discrete occasion.  
10 The Court therefore finds that common issues do not predominate over noncommon  
11 questions. Individual trials would also be the superior method of adjudicating each  
12 nurse’s claims—not a class action.

13 **D. Numerosity, typicality, and adequate representation**

14 Since the Court finds that Ekin has not established Rule 23’s commonality  
15 requirement or that common questions predominate, the Court need not address the  
16 Rule’s remaining requirements.

17 **V. CONCLUSION**

18 The Court finds that Ekin has not demonstrated Rule 23’s requirements of  
19 ascertainability, commonality, or predominance. The Court consequently **DENIES**  
20 Ekin’s Motion for Class Certification. (ECF No. 55.)

21 **IT IS SO ORDERED.**

22  
23 October 25, 2013

24  
25   
26 \_\_\_\_\_  
27 **OTIS D. WRIGHT, II**  
28 **UNITED STATES DISTRICT JUDGE**